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CHTR 32193, 59548/T-87-468
CSC 9115, 59548/T-87-470
LCC 596, 914/T-87-467
IRCC 32193, 59548/T-87-469

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA TRANSPORTATION REGULATION BOARD

In the Matter of the
Consolidated Hearings
Related to Space Center
Transport and Wintz
Freight Systems

FINDINGS OF FACT,
CONCLUSIONS,
RECOMMENDATIONS
AND MEMORANDUM

The above-entitled matter came on for hearing before Allan W. Klein, Administrative Law Judge, on May 2 and 3, 1988, in South St. Paul.

Appearing on behalf of the Transferor, Space Center, Inc., was William B. Hockensmith, General Counsel, Space Center, Inc., 444 Pine Street, St. Paul, Minnesota 55101.

Appearing on behalf of the Transferee, DGT Properties, Inc. was Corey J. Ayling, of the firm of O'Connor & Hannan, 3800 IDS Center, Minneapolis, Minnesota 55402.

Appearing on behalf of Protestant Bjorklund Trucking was Andrew R. Clark, of the firm of Mackall, Crounse & Moore, 1600 TCF Tower, 121 South Eighth Street, Minneapolis, Minnesota 55402.

Appearing on behalf of Intervenor Commissioner of Transportation was Special Assistant Attorney General John B. Galus, 515 Transportation Building, St. Paul, Minnesota 55155.

The record closed on August 1, 1988.

Notice is hereby given that, pursuant to Minn. Stat. 14.61, and the Rules of Practice of the Public Utilities Commission, as applicable to the Transportation Regulation Board, and the Rules of the Office of Administrative Hearings, exceptions to this Report, if any, by any party adversely affected must be filed within 20 days of the mailing date hereof with the Transportation Regulation Board, Minnesota Administrative Truck Center, 254 Livestock Exchange Building, 100 Stockyards Road, South St. Paul, Minnesota 55075. Exceptions must be specific and stated and numbered separately. Proposed Findings of Fact, Conclusions and Order should be included, and copies thereof shall be served upon all parties. If desired, a reply to exceptions may be filed and

served within ten days after the service of the exceptions to which reply is made. Oral argument before a majority of the Board may be permitted to all parties adversely affected by the Administrative Law Judge's recommendation who request such argument. Such request must accompany the filed exceptions

or reply, and an original and five copies of each document must be filed with the Board.

The Minnesota Transportation Regulation Board will make the final determination of the matter after the expiration of the period for filing exceptions as set forth above, or after oral argument, if such is requested and had in the matter.

Further notice is hereby given that the Board may, at its own discretion, accept or reject the Administrative Law Judge's recommendation and that said recommendation has no legal effect unless expressly adopted by the Board as its final order.

STATEMENT OF ISSUES

May the IRCC and LCC permits presently held by subsidiaries of Space Center, Inc. be transferred to subsidiaries of DGT Properties, Inc. without violating the provisions of Minn. Stat. 221.151? More particularly, who effectively controls DGT Properties, Inc. -- George W. Wintz, Jr. or Thomas G. Wintz?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Historical_Background

1. Prior to the summer of 1987, Space Center, Inc. owned and operated Space Center Transport, Inc. This was an intrastate carrier holding LCC and IRCC permits. It also owned a charter permit which is not at issue in this proceeding.

2. Prior to the summer of 1987, Space Center, Inc. also owned and operated Sterling Cartage Company, which held a courier services carrier permit, which is no longer at issue in this proceeding.

3. In the two-year period prior to June of 1987, Space Center Transport, Inc. used its LCC authority to handle general commodities throughout the Twin Cities commercial zone. Accounts included 3M Company and Ford. T. 40-41.

4. In the two-year period prior to June of 1987, Space Center Transport, Inc. used its IRCC authority to transport general commodities for a large number of customers. An abstract of activity during 11 months (Ex. 102) demonstrates service to approximately 100 Minnesota cities involving a broad

array of general commodities. T. 46-49, Ex. 103 and 104.

5. In the fall of 1986, Space Center, Inc. decided to explore the divestiture of Space Center Transport and Sterling Cartage either through a sale of the assets, sale of the stock, or through liquidations. It attempted to locate a buyer for the companies, and ultimately began negotiations with George W. Wintz, Jr. in the spring of 1987. T. 9.

6. After negotiations in May and June of 1987, it was agreed that the transportation businesses of Space Center, Inc. would be sold to DGT

Properties, Inc. One of the conditions of the sale was that the Space Center name and logo could not be used after the sale. Immediately prior to the sale, Space Center Transport changed its name to Wintz Freight Systems, Inc. The sale took the form of a sale of stock, so that what was actually sold was 100 percent of the stock of Wintz Freight Systems, Inc. by Space Center, Inc. to DGT Properties, Inc. After the sale, which occurred on June 19, 1987, Space Center, Inc. took no part in the operation of the transportation businesses.

7. DGT Properties, Inc. is a Minnesota corporation. It was formed on May 19, 1986. The sole shareholder was George Wintz. Its first officers were George Wintz, President; Thomas Wintz, Vice-President; and Julie McDonald, Secretary. The sole director was George Wintz.

B. George Wintz is a successful trucking entrepreneur who owns Wintz Truck Leasing Co., Winko Warehouse, Milbank Freightways, Quality Drivers, Twin City Garage & Trailer Repair, and Opportunity Management, Inc. He also owns 98 percent of a partnership known as Wintz Investment Company. George Wintz has a personal net worth in excess of \$10 million. T. 229.

9. Wintz Truck Leasing holds local cartage, charter and contract carrier authority pursuant to Minn. Stat. ch. 221. Winko Warehouse also holds a local cartage permit. Milbank Freightways operates as an interstate carrier. Opportunity Management, Inc. provides legal, financial and accounting services to George Wintz and his various companies and to Thomas Wintz and his various companies.

10. George Wintz was born in March of 1940. He began working in the trucking business when he was still in school as a driver, and, in 1965, started his own company. He has been involved in the transportation industry since then. He has two children, Thomas George Wintz and Debra Strom.

11. Thomas Wintz was born in April of 1966. He is currently 22 years old. He graduated from St. Thomas College in June of 1988. He was, therefore, still a student at the time of the hearing and at all times discussed in this Report. He is legally blind, but has progressed through high school and college with a high degree of success. He graduated from St. Thomas cum laude, with a 3.51 (A-) grade point average overall, and a 3.70 (A-) grade point average in his major field. T. 266. He has developed an interest in electronics, having been licensed as an amateur radio operator as a child, and has since become involved with computers. He has an aptitude for

independent study and self teaching, and has developed an ability to program, debug and operate both microcomputers and minicomputers. T. 268.

12. Since the start of high school, and extending intermittently during his college career, Thomas Wintz has performed various duties for his father's businesses. He has done computer consulting, programming and debugging since the ninth grade. In addition, he has been a dock laborer, dock foreman, and weekend dispatcher. T. 258-78.

13. For a number of years, it has been the goal of both George Wintz and Thomas Wintz that Thomas would establish himself in the trucking industry, but independent of his father. T. 64, 280. A logical time for him to do this would be upon his graduation from college. His college graduation was scheduled for June of 1988. The acquisition of the Space Center businesses occurred in June of 1987, a year ahead of the graduation date.

The First Year of DGT and the Acquisition of the Space Center Businesses

14. DGT was formed in May of 1986. At the outset, George Wintz was its sole director, sole shareholder and president. T. 58, Ex. 114.

15. DGT Properties was named for George Wintz and his children, the initials being the first letters of their first names, Debbie, George and Tom. T. 391. George Wintz's testimony that there was no particular significance to the initials is not credible. T. 58, 105.

16. In the spring of 1986, George Wintz entered into an agreement whereby Wintz Investment Company would purchase a truck terminal located at 2707 Territorial Road in St. Paul. The purchase price was \$500,000. T. 117. Once DGT was formed, George Wintz assigned Wintz Investment's rights under the purchase agreement to DGT. DGT then purchased the terminal. T. 118.

17. DGT financed the purchase of the terminal with a \$650,000 loan from Sprague National Bank. This bank loan was guaranteed by George Wintz personally. Financing of the Territorial Road terminal resulted in a \$299,579.87 balance which was deposited in DGT's checking account at the St. Anthony Park Bank. Ex. 7 and 8. The sole signatory on that checking account at the St. Anthony Park Bank was George Wintz.

18. For approximately the next six months DGT leased the Territorial Road terminal to Mix Transfer. T. 61.

19. In October of 1986, George Wintz caused DGT to acquire two residential condominiums, one in Roseville and the other in Scottsdale, Arizona. These condominiums had originally been acquired by George Wintz, who assigned them to Tom Wintz, who, in turn, assigned them to DGT Properties. The condominiums still carried a mortgage from Sprague National Bank, which was also assigned to DGT. T. 106-08. Since October of 1986, and for some time before then, George Wintz has occupied the Roseville condominium rent-free as his principal residence. The Arizona condominium has been used by George Wintz, Thomas Wintz and other family members as a vacation property. T. 108. DGT makes all mortgage payments on both condominiums. In addition, DGT pays the association fees charged for the Arizona condominium. George Wintz pays the association fees for the Roseville condominium. T. 108-09.

20. In addition to paying the association fees for the Arizona condominium, DGT also pays the association fees for a second Arizona condominium, which is owned by Thomas Wintz, but is occupied by his grandmother and grandfather. T. 234-35.

21. During the first year of DGT's operations, the balance in its St. Anthony Park Bank checking account declined from its high of \$299,579.87 on May 30, 1986 to \$2,843.17 on May 29 of 1987. The bulk of the money was withdrawn during June and July of 1986, and for the most part the balance remained under \$5,000 since the end of July, 1986. This reduction was accomplished by George Wintz writing out checks totalling \$181,700 to himself, \$169,000 to Wintz Investment Company, and \$50,000 to obtain an option on a terminal which was later assigned to Wintz Truck Leasing. The total of such intercompany transfers out of DGT during that year was, therefore, \$400,700.

22. During the first year of operations, money deposited into the DGT checking account from George Wintz and his companies totaled \$190,885.93. Of this, \$170,852.35 came from George Wintz personally, \$18,008.51 came from Wintz Investment Company, and \$2,025.07 came from Opportunity Management Services.

23. Although both George and Thomas Wintz testified that it was the intent of both that various intercompany transfers between DGT and George Wintz (and his companies) would be interest bearing in both directions, there is no evidence that any interest has, in fact, been computed or paid, either by DGT or by George Wintz and his companies. While DGT has made regular payments to banks and others outside of the family operations, there have not been regular payments made to or from the family operations to reflect any regular settling of debts or payment of interest for the May '86-May '87 time period.

24. Explanations for the intercompany transactions included an argument that it made no sense to leave large sums of money sitting in the DGT checking account because that account was non-interest bearing, and, that advances made to George Wintz or his companies enabled them to make profitable investments that would eventually be credited to the benefit of DGT. However, there is no paperwork memorializing these "investments", so that it would be impossible based on this record to determine what profits were due to DGT or, for that matter, if there were any profits at all. George Wintz candidly explained why he wrote some checks to himself individually, while he wrote others to Wintz Investment Company -- it depended upon which entity needed the money at that particular time. T. 80-81. Moreover, George Wintz was unable to recall or identify the details of any of the investments which were allegedly made for the account of DGT. T. 178-80.

Purchase of the Space_Center Businesses

25. As detailed earlier, George Wintz negotiated, on behalf of DGT Properties, for the purchase of 100 percent of the common stock of two subsidiaries of Space Center Transport, Inc. By the time of the purchase, these had been renamed Wintz Freight Systems, Inc. and Sterling Freight Systems, Inc. The negotiations were handled entirely by George Wintz, and Thomas Wintz did not participate in them at all.

26. In payment for the stock of these businesses, DGT paid \$370,000 in cash, and transferred the Territorial Road terminal free and clear of any outstanding obligations. The total transaction was valued at approximately \$1,020,000.

27. In order to come up with the \$370,000 cash portion of the payment, George Wintz arranged for DGT to borrow \$370,000 from the Maplewood State Bank. The loan was personally guaranteed by George Wintz, and further secured

by his pledging the equipment of Wintz Truck Leasing as collateral. T. 67, 73-74, and 184-89.

28. In order to transfer the Territorial Road terminal free and clear, it was necessary to pay off the existing mortgage. In order to do this, George Wintz caused Wintz Truck Leasing to loan \$1.4 million to DGT. On July 2, 1987,

George Wintz signed a note on behalf of DGT for the \$1.4 million. Ex. 110. Part of the proceeds of this loan was used to clear the mortgage, and the remainder (\$712,552.20) was deposited in DGT's checking account. T 221, 380 and Ex. 22. The purpose of the excess cash was to provide sufficient operating funds for DGT. Operating funds were needed because DGT had taken on the Space Center businesses, and Space Center's pro forma combined balance sheets for Wintz Freight Systems and Sterling indicated that current liabilities exceeded current assets by \$664,000.

Scaling Down the Space Center Businesses

29. At the time of the June 19, 1987 stock sale from Space Center to DGT, Space Center Transport and Sterling Cartage, together, enjoyed approximately \$6,000,000 in annual traffic. Sterling owned approximately 50 units of rolling stock, and Space Center Transport owned between 50 and 75 motorized units and approximately 250 trailers. T. 189-94, 199-200, and 328-34. Thomas Wintz felt this was more than he could handle. T. 280-81.

30. Wintz Truck Leasing and DGT agreed that within six months of July 2, 1987, DGT would sell certain rolling stock to Wintz Truck Leasing for a price to be negotiated, but not to exceed \$800,000. This was one of the provisions in the \$1.4 million loan agreement. This sale did, in fact, occur shortly after the June 19 stock transfer. The fair market value of the rolling stock was approximately \$1.0 million. Its book value was around \$700,000. T. 319.

31. The \$1.4 million note from DGT to Wintz Truck Leasing calls for interest to be paid monthly, commencing February 2, 1988, up to and including January 2, 1991, at which time the entire balance then remaining is due and payable. By the date of the hearing (May 1988), DGT had made no interest payments to Wintz Truck Leasing. T. 350. Depending upon how the rolling stock is valued (its fair market value was \$1.0 million, but the note says the purchase price shall not exceed \$800,000), the balance outstanding on the note is either \$400,000 or \$600,000. Interest is at the rate of nine percent, and, therefore, the monthly interest payments would be somewhere between \$3,000 and \$4,500. But if the various monies transferred in and out of DGT by George Wintz and his companies are deemed to affect the outstanding balance on this note, then the amount of interest due and owing, if any, is unknown, as there

has been no final accounting of those various transfers. T. 351.

32. The sale of the rolling stock resulted in all of Sterling's rolling stock going to Wintz Truck Leasing, and all but between 20 and 25 of Space Center Transport's tractors going to Wintz Truck Leasing. Aside from new equipment purchased since then, the balance of the Space Center equipment is currently owned and operated by Wintz Freight Systems.

33. In addition to the rolling stock, some of the business that used to be carried by the Space Center companies has gone to Wintz Truck Leasing. Wintz Truck Leasing acquired approximately \$3.0 million of annual traffic previously serviced by the two Space Center businesses, and Wintz Freight Systems retained approximately \$1.4 million. Sterling Cartage is dormant, and handles no traffic. The balance of the Space Center business is being handled by other carriers.

Sale of DGT From George_to Thomas Wintz

34. The sale of DGT stock from George Wintz to Thomas Wintz was accomplished sometime in May of 1987. The records are contradictory with regard to the exact date. The actual purchase agreement for the sale of the stock is dated May 27, 1987, and calls for a closing on May 27. The payment for the stock was a \$40,000 note. That note is dated May 12, 1987, and refers to a purchase agreement dated May 12. There is no purchase agreement dated May 12 in the record. Ex. 107 and 108. The corporate records indicate that the stock certificate owned by George Wintz was surrendered on May 27, and formally received on May 29, but a new stock certificate to Thomas Wintz was not issued until July 25. Ex. 114, T. 286. Neither George nor Thomas Wintz have any independent recollection of the dates upon which these various documents were executed, and it can only be concluded that either the stock purchase agreement or the note is in error. T. 205-06, 382-84.

35. June 19, 1987 was the closing date for the sale of the stock of the Space Center businesses to DGT. George Wintz attended the closing, which was a complex and prolonged affair, lasting over 15 hours. Near the end of the closing, near midnight, George Wintz signed a thick stack of papers. Among these papers was a document entitled "Certified Copy of the Resolutions of the Combined Meeting of the Board of Directors and the Shareholders of DGT Properties, Inc." See, Knapp Deposition Exhibit 2, part of Ex. 118. In that document, George L. Wintz identified himself as the sole shareholder of DGT Properties, Inc., and executed the document as sole director and sole shareholder. The document authorized the stock purchase and the conveyance of the Territorial Road terminal as part of the purchase price. When it later came to light that this document was incorrect, George Wintz executed an affidavit asserting that on May 27, 1987, all the stock of DGT was transferred to Thomas G. Wintz, and that the certified copy of the resolutions which George Wintz had executed on June 19, 1987 was mistakenly executed. The affidavit goes on to state that as of June 19, 1987, Thomas G. Wintz was the sole shareholder of DGT.

36. The DGT corporate record book also contains a document entitled "Combined Meeting of Board of Directors and Shareholders of DGT Properties, Inc.". This document is dated June 19, 1987, and contains the resolutions which were discussed in the "Certified Copy of the Resolutions of the Combined Meeting of Board of Directors and the Shareholders of DGT Properties, Inc." which is part of the Knapp deposition. This document is signed by George L. Wintz as sole director, and Thomas G. Wintz as sole shareholder. See, Ex. 114, p. 24.

37. On July 29, 1987, Gilbert Wiedenhoef, of the Department of Transportation, sent a letter to Space Center Transport, Inc., indicating that

it had been reported to Mn/DOT that the IRCC, CHTR and LCC authority had been

sold. The letter requests Space Center Transport to provide certain information to the Department regarding the sale and the new owners.

38. On August 4, 1987, Paul R. Knapp, corporate counsel for Space Center Transport, Inc., replied to the Wiedenhoeft inquiry. He indicated that the authorities were not sold, but rather the corporate stock was sold. He went on to say that the stock was sold "to DGT Properties, Inc., a company controlled by Mr. George Wintz." Knapp sent a copy of the letter to Mr.

Stanley C. Olsen, who Knapp identified as an attorney representing DGT Properties, Inc. with regard to operating authority issues. Ex. 32.

39. On August 11, 1987, Attorney Stanley C. Olsen sent a letter to Mr. Wiedenhoeft. The letter was written to "correct misstatements" contained in the Knapp letter. Olsen stated:

Mr. George Wintz is not the control person of DGT Properties, Inc. The sole shareholder and control person of DGT Properties, Inc. is Thomas Wintz.

Olsen sent a copy of this letter to Knapp, who was surprised by its contents. Knapp had believed that George Wintz was the sole shareholder of DGT Properties as a result of the document (Certified Copy of the Resolutions of the Combined Meeting of Board of Directors . . . , Knapp Deposition Ex. 2, described above) executed by George Wintz at the closing on June 19. Upon receipt of Olsen's letter, Knapp telephoned Olsen and confirmed the letter. Knapp was concerned because the Territorial Road terminal had been transferred to Space Center in the transaction. Knapp wanted assurances that title to the property was clear and that the person who had transferred the property to them (George Wintz) had authority to transfer it. Knapp Deposition, p. 13.

Presidency of DGT

40. When DGT was first formed in May of 1986, George Wintz was elected its first president. He continued in that position for the remainder of 1986 and into 1987. At the time of the June 19, 1987 closing discussed above, George Wintz was still the corporation's president. Indeed, it was George Wintz, and not Thomas Wintz, who participated in the closing. Thomas Wintz did not even attend.

41. The corporate minute book contains a letter, dated July 15, 1987, executed by George Wintz, whereby he resigned as president of DGT, effective immediately. The minute book contains a written action of the Board of Directors dated July 16, 1987, indicating that Thomas G. Wintz was elected president of DGT.

42. The corporate minute book also contains an agreement between DGT and George L. Wintz (hereinafter the "consulting agreement"). This agreement is signed by Thomas Wintz as president of DGT. Ex. 112. It is dated July 1, 1987. This date must be an error. T. 386. The correct dates for George Wintz's resignation and Thomas Wintz's election are July 15 and 16, respectively.

Control of DGT After the Acquisitions and Change of Officers

43. On June 19, 1987, when DGT acquired the Space Center businesses, Thomas Wintz was still a college student. He was not scheduled to graduate until May 1988. During the 1986-1987 winter, Thomas worked as a computer consultant for Opportunity Management Services. He was assigned to Milbank Freightways, where he was working with their computer. He worked approximately 20 hours per month, on the Milbank computer, and continued that work through

the summer of '87, the fall of '87, and the winter of '87-'88. He was still doing it as of the date of the hearing (May 1988). T. 275-77.

44. During the summer of 1987, Thomas Wintz did not go to summer school. He resumed his studies, for his senior year, in the fall of 1987. He carried a full load during the fall semester. Some classes were day classes, some were evening classes. During the spring semester of his senior year (early 1988), he carried a 50 percent course load, made up of all evening courses.

45. In July of 1987, Thomas became the president and sole officer (and sole director) of DGT. In addition, he is the president of Wintz Freight Systems, which is the actual company operating equipment relevant to this proceeding. Thomas is also the president of Sterling Freight Systems, which is dormant.

46. A review of the checks drawn on the account of DGT from July 15, 1987 onward indicates no change from past practices: George Wintz signed all of them, and they reflect large transfers of money to himself, Wintz Investment Company, Debra Strom (George's daughter, and Thomas' sister), Craig Hallum, a local broker-dealer where George Wintz maintained his personal investments, payments on the condominiums (both in Roseville and Scottsdale), and payments to a construction company in connection with work done on a residential investment belonging to Debra Strom. Indeed, although the record contains copies of checks and check registers from July of 1987 through March of 1988, Thomas Wintz did not sign any of the checks. They were all signed by George Wintz. Thomas Wintz was added as a signatory sometime in 1988. T. 12b-27.

47. On August 13, 1987, George Wintz issued a DGT check in the amount of \$210,000, payable to the Park Bank. When asked about this, he indicated it was to purchase a cashier's check for payment to Wintz Truck Leasing in order to reduce the \$1.4 million note. But he was not sure of that. T. 155-56. There are numerous checks flowing between Wintz Truck Leasing and DGT, and none of them are cashier's checks. When asked further about why a cashier's check was needed in this case, he was unable to explain the reason. T. 233-34. Thomas Wintz had no knowledge of the check or its purpose. T. 352.

48. On February 5 and March 3, 1988, George Wintz signed and issued DGT checks in the amounts of \$20,000 and \$15,000, payable to Merle's Construction. These checks were for the purpose of paying for the repair of certain real property which Debra Strom was preparing to put up for sale. T. 1b6-70. This is supposedly a loan to Debra, but like the other loans, there is no written loan agreement or any evidence in the record of the purpose for the payments. She has not made any repayments. Despite the fact that these were issued in

the winter of 1988, well after Thomas became the president of the company, he did not know the purpose of the two checks until he heard his father testify about them at the hearing. T. 386-87.

49. In general, Thomas Wintz had no knowledge of the money flowing between DGT, his father, other companies controlled by his father, and to third parties for payment of his father's obligations. He did not routinely review the checks either before or after issuance. T. 128. At the time of the hearing (May 1988), his accountants were still working on the income tax returns for DGT and his own personal return in an attempt to compute the interest due to and from DGT, George Wintz and the other Wintz companies. T. 351-52, 356-64, 390-91.

50. It was planned that Tom would take over control of the DGT checkbook in June or July of 1988. T. 86.

51. Despite George Wintz's control of the DGT checkbook, Thomas Wintz did control the day-to-day, nuts-and-bolts of the trucking operation. After the company was "scaled down" as discussed earlier, Wintz Freight Systems had between 20 and 25 trucks and 50 drivers. Fifteen of them were employed on a regular fulltime basis. The customer base consisted of one large house account, at which 11 trucks were domiciled, and the remainder was miscellaneous irregular route hauling for a variety of customers. T. 291-93.

52. Thomas Wintz directly supervises all of the drivers. He carries a beeper with him so that he can be located. He is responsible for collective bargaining, grievances, and labor relations. T. 295-99.

53. Thomas Wintz handles customer relations, including the preparation of bills. T. 296-97. He processes and computes the payroll. T. 294. He handles the checkbook of Wintz Freight Systems and authorizes payment on all bills. T. 300. He oversees maintenance schedules. T. 204-05. A fair characterization of his activities, as compared with those of his father, might be to characterize Thomas as the vice-president in charge of operations, while his father is the chief executive officer. Neither of those titles are legally correct, but they are accurate reflections of the division of labor which has existed to date. From the date of its formation through the date of the hearing, George Wintz effectively controlled DGT Properties.

Other Indicia of Control

54. 2323 Terminal Road in Roseville is the administrative office of DGT and its two subsidiaries, Wintz Freight Systems and Sterling Freight Systems. This is also the location where George Wintz operates Wintz Truck Leasing. George has provided Thomas with space, rent free.

55. Maintenance for DGT's rolling stock is performed by Wintz Truck Leasing. The rolling stock is based (when not at a house account or elsewhere) at the Wintz Truck Leasing facility.

56. DGT and Sterling Freight Systems have no employees. Wintz Freight Systems has a number of drivers, but otherwise has no employees other than Thomas. All administrative and clerical services are provided to DGT, Wintz Freight Systems and Sterling Freight Systems, free of charge, by George Wintz through his wholly owned management company, Opportunity Management Services. These services include the preparation of Wintz Freight Systems' payroll checks, invoices, and all necessary secretarial services. T. 98-99, 103-05, and 295-98.

57. The secretarial support provided without charge is worth only approximately \$100 per month. The clerical support amounts to only another \$100 per month. The rent is worth between \$200 and \$500 per month.

58. Wintz Freight Systems receives \$10,000 per month from Milbank Freightways for the services of drivers and tractors to shuttle Milbank trailers. In addition, Wintz Freight Systems receives another \$10,000 a month for the lease of approximately five trucks to Milbank. T. 306-07.

59. DGT hired George Wintz as a management consultant in an agreement dated July 1, 1987. Ex. 112. For ten years, DGT must pay George Wintz a

percentage of its gross revenues in monthly installments. For the first five years, he is to be paid five percent of the gross revenues; for the sixth and seventh years, six percent; and for the eighth, ninth and tenth years, seven percent of the gross revenues. In addition, he is to be reimbursed for all reasonable expenses. The agreement recognizes that he may continue other business activities, and that it is not exclusive as to his time or services. Finally, the agreement is not contingent upon any level of profitability of the company. In other words, George Wintz is entitled to receive a percentage of the gross revenues regardless of whether or not the company is profitable. For example, if the operations of Wintz Freight Systems are consolidated with DGT, there are roughly \$140,000 in monthly revenues. T. 306-07. At the rate of five percent of gross revenues, George Wintz is owed \$7,000 per month, or \$84,000 per year. However, no payments have been made under the agreement. While George Wintz initially spent between five and six hours per week assisting Thomas, that has dropped, and now he spends only about ten hours per month. Since this is less than was originally contemplated, George and Thomas have agreed to renegotiate the consulting agreement to provide for remuneration at an hourly rate, rather than as a percentage of gross revenues. The renegotiation has not yet taken place, so the rate has not yet been set. T. 85-94 and 313.

60. The consolidated income statement of DGT, Wintz Freight Systems and Sterling shows \$140,000 in monthly revenues, and \$131,100 in monthly expenses. If the free rent, secretarial service, clerical support and an estimate of the hourly value of George Wintz's consulting is added in, the expenses increase to \$132,800. This leaves a Ing forma net profit (before taxes) of \$7,200. T. 315.

Procedural-Historv

61. On or about August 31, 1987, a Stock Transfer Reporting Form (Mn/DOT Form 7059) was filed with the Department of Transportation. Ex. 115. It indicates that Space Center, Inc. (Transferor) and DGT Properties, Inc. (Transferee) did, on June 19, 1987, transfer shares of Wintz Freight Systems, Inc. (f/n/a Space Center Transport, Inc.). The form indicates that the transferee did not hold or own any other certificate or permit issued by the Commission, but that it did own 100 percent of the stock in another permit

carrier, Sterling Freight Systems, Inc.

62. On or about September 9, 1987, a joint petition for transfer of local cartage carrier authority was filed with the Department of Transportation on Mn/DOT Form 7046. It indicated that Wintz Freight Systems, Inc. (f/n/a Space Center Transportation, Inc.) was the transferor, and Wintz Freight Systems, Inc. was the transferee. It indicated that Thomas G. Wintz was the sole officer, sole director and sole shareholder. It indicated that transferee presently held CHTR authority and IRCC authority, as well as ICC authority. Ex. 116.

63. On or about September 9, 1987, a joint petition for transfer of irregular route common carrier permit authority was filed with the Department on Form Mn/DOT 7048. It indicates that the transferor is Wintz Freight Systems, Inc. (f/n/a Space Center Transport, Inc.) and the transferee is Wintz Freight Systems, Inc. It indicates that Thomas G. Wintz is the sole officer, sole director and sole shareholder of the transferee. It indicates that

transferee presently holds LCC and CHTR authority, as well as interstate motor carrier authority. In response to the question, 'Please list if stockholder or partner in other permit or certificate', the answer is "no". Ex. 117.

64. At the request of the Board, new joint petitions were filed. On or about October 12, 1987, another joint petition for transfer of local cartage carrier authority was filed with the Department on Form Mn/DOT 7046. This one indicates that the transferor is Space Center, Inc. and the transferee is DGT Properties, Inc. It indicates that Thomas G. Wintz is the sole officer, sole director and sole shareholder of transferee, and that the transferee presently holds IRCC and CHTR authority, as well as interstate authority. Notice of the proposed transfer was published in the Board's weekly calendar of October 16, 1987, with a protest date of November 5, 1987. Protests were received from four Protestants, and the matter was set for hearing on January 25 and subsequent days, as part of a consolidated hearing involved not only the LCC authority, but also the IRCC, CSC and CHTR authorities. Notice of that consolidated hearing was published in the Board's calendar of December 18, 1987 and weekly thereafter. However, on December 15, 1987, the Protestants in the LCC part requested that they be permitted to withdraw their protests.

65. On or about October 12, 1987, another joint petition for transfer of permit carrier authority (relating to the IRCC authority) was filed with the Department on Mn/DOT Form 7048. This petition indicated Space Center, Inc. as the transferor, and DGT Properties, Inc. as the transferee. It indicated that Thomas G. Wintz was the sole officer, sole director and sole shareholder of the transferee, and that the transferee presently held LCC and CHTR authority, as well as interstate motor carrier authority. In response to the question, "Please list if stockholder or partner in other permit or certificate", this form indicates that the answer is "no" with regard to Wintz Freight Systems, Inc., but it goes on to indicate that DGT Properties, Inc. owns 100 percent of the stock in Sterling Freight Systems, Inc., which holds CSC permit authority. Notice of this joint petition was published in the Board's weekly calendar of October 16, 1987, setting a protest date for November 5, 1987. Protests were received from three Protestants, and the matter was scheduled for hearing on January 25 and following days. Notice of the hearing was given in the Board's weekly calendar of December 18, 1987, and weekly thereafter.

66. The consolidated hearing was continued from its January date in order to permit parties to discuss settlement.

67. On February 19, 1988, the Commissioner of Transportation filed a petition to intervene in the four proceedings in order to "present evidence and argument concerning the public interest and the appropriateness of the Board's approval of the transfer petitions involved in these proceedings pursuant to Minn. Stat. 221.151." The transferees filed an objection to the petition. On March 10, 1988, the Administrative Law Judge issued the First Prehearing Order, wherein he granted the Commissioner's petition to intervene.

68. On March 28, 1988, a prehearing conference was conducted by telephone call, and on March 29, 1988, the Administrative Law Judge issued the Second Prehearing Order resolving various discovery disputes. As a part of this Order, a Protective Order was entered to protect certain information which was claimed to be proprietary information or trade secret.

69. The consolidated hearing included petitions to transfer IRCC, LCC, CHTR and courier authority. However, by the start of the hearing in May,

1988, the joint petitioners had withdrawn the courier permit and charter permit petitions, leaving only the IRCC and LCC petitions at issue. And with regard to those two petitions, by the time of the start of the hearing, all Protestants had withdrawn their protests, subject to the adoption of a restriction to the IRCC authority. T. 7 and 34.

PERTINENT STATUTORY EXCERPTS

Minn. Stat. 221.151, subd. 1 (1986) provides, in pertinent part:

Permits, except livestock permits, issued under section 221.121 may be assigned or transferred, but only upon the order of the board approving the transfer or assignment after notice and hearing.

Provided, however, that the board shall make no order granting the sale or lease of a permit to a person or corporation or association which holds a certificate or permit, other than local cartage carrier permit, from the board under this chapter or to a common carrier by rail.

If an authority to operate as a permit carrier is held by a corporation, a sale, assignment, pledge, or other transfer of the stock interest in the corporation which will accomplish a substantial or material change or transfer of the majority ownership of the corporation, as exercised through its stockholders, must be reported in the manner prescribed in the rules of the board within 90 days after the sale, assignment, pledge or other transfer of stock. The board shall then make a finding whether or not the stock transfer does, in fact, constitute a sale, lease, or other transfer of the permit of the corporation to a new party or parties and, if they so find, then the continuance of the permit issued to the corporation may only be upon the corporation's complying with the standards and procedures otherwise imposed by this section.

Based upon the foregoing, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Transportation Regulation Board has jurisdiction over the subject matter of the hearing.
2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter is properly before the Administrative Law Judge.
3. There is no legal bar to the transfer of the local cartage carrier permit (LCC 596) at issue in this proceeding. There are no remaining

Protestants and the Commissioner has not made any showing of noncompliance.

The tests of Minn. Stat. 221.296, subd. 8 have been met with one exception -- the notice of the stock transfer was not given within 30 days.

However, this is deemed to be directory, not jurisdictional. See, Memorandum.

4. With regard to the IRCC transfer, the sale of the stock interest in Wintz Freight Systems, Inc. did accomplish a substantial or material change or transfer of the majority ownership of the corporation to a new party or parties within the meaning of Minn. Stat. S 221.151. Wintz Freight Systems, Inc. is, therefore, required to comply with the standards and procedures imposed by Minn. Stat. 221.151.

5. The Transportation Regulation Board is prohibited from issuing an Order granting the sale of a permit to a corporation which holds a certificate or permit. The Board has appropriately interpreted the statute to extend to situations involving the transfer of a permit to a corporation which is owned or effectively controlled by an individual with a pre-existing interest in another certificate or permit (other than local cartage carrier permit). Petition of Fritz Trucking, Inc., 407 N.W.2d 447 (Minn. App. 1987).

6. DGT Properties, Inc., being effectively controlled by George L. Wintz, Jr., does not comply with the standards of Minn. Stat. 221.151 because George L. Wintz, Jr. also effectively controls Wintz Truck Leasing, which already holds contract carrier permit authority and charter permit authority.

7. The appropriate test for determining whether George L. Wintz, Jr.'s control of Wintz Truck Leasing Co. ought to be attributed to DGT Properties, Inc. is not the traditional "pierce the corporate veil" test used to determine a shareholder's financial liability for corporate debts. Instead, the appropriate test is the plain meaning of the "effectively controls" test of Fritz. Effective control means the ability to direct the management and policies of a corporation. The question is one of fact, to be determined not by any artificial test, but rather from the particular circumstances of each case. It is a complex question requiring appraisal of the overall effect of various relationships between individuals and other circumstances present in a particular case based upon the realities of the situation.

THIS REPORT IS NOT AN ORDER AND NO AUTHORITY IS GRANTED HEREIN. THE

TRANSPORTATION REGULATION BOARD WILL ISSUE THE ORDER OF AUTHORITY WHICH MAY ADOPT OR DIFFER FROM THE FOLLOWING RECOMMENDATIONS.

Based upon the foregoing, the Administrative Law Judge makes the following:

RECOMMENDATIONS

1. That the joint petition to transfer local cartage carrier permit authority be GRANTED.

2. That the joint petition to transfer irregular route common carrier permit authority be DENIED; or, in the alternative, that it be GRANTED, SUBJECT TO such conditions as the Board may prescribe to ensure that the operations of DGT Properties, Wintz Freight Systems and Sterling Cartage are

separated and isolated from those of George L. Wintz, Jr. within a reasonable period of time. See, Memorandum.

Dated this 28th day of September, 1988.

ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape Recorded, Transcribed by Mary Ann Hintz.

MEMORANDUM

I.

Alternative recommendations are made because there is nothing illegal about what the Wintzes are trying to accomplish -- the father is trying to help the son get set up in business for himself. The law does not prohibit this. The problem arises because George Wintz started about a year too early, while Thomas was still in college. Thomas was unable to participate in the formation of DGT, in the acquisition of the Space Center businesses, and in the restructuring of those businesses into a manageable size for him to operate. All that was done by George Wintz, with Tom either totally absent or very much on the sidelines. There is no question but that from the formation of DGT to the date of the hearing, George Wintz controlled DGT.

In late May of this year, however, Thomas graduated from college, and is now able to devote his full energies to the businesses.

The purpose of the law would be served if Thomas Wintz were forced to modify DGT's relationship with his father, so that Thomas controlled DGT in fact, as well as in name. There is nothing in the law that prohibits members of the same family holding permits, so long as they are truly independent of each other.

The Board has the particular expertise to fashion the specifics of how the two ventures ought to be separated, as well as to set reasonable time periods to accomplish the details. Such conditions could relate to the sharing of common services and facilities, the repayment of advances and debts, prohibitions against future operational and financial entanglements, and such other reasonable conditions as the Board might require in order to ensure that the operations are kept independent of one another. The goal is to make sure that George Wintz is not in control of DGT and its subsidiaries.

II.

One of the issues in this case is what test should be used to determine who "effectively controls" DGT and Wintz Freight Systems. Counsel for DGT urges that the test for "piercing the corporate veil" to determine individual liability for corporate debts ought to be the test used here. See, for example, *Victoria Elevator Co. v. Meriden Grain Co.*, 283 N.W.2d 509 (Minn. 1979). On the other hand, counsel for the Commissioner urges that the appropriate test is that derived from plain language and common usage of the word "control".

The Commissioner's position is the correct one. In determining whether or not a person effectively controls a corporation, each case must be determined on its own facts. Relationships between individuals must be assessed and evaluated, and the past history of corporate decision-making must be analyzed, not only in terms of form, but also in terms of substance. It boils down to deciding, as a practical matter, who was able to direct the management of the corporation.

There can be no serious question but that George Wintz controlled DGT Properties from the time of its inception up to the date of the hearing. He decided who it would do business with, he decided on what terms and conditions it would enter into contracts and arrangements, and he determined its size and shape. The various transfers of money to and from DGT dramatically evidence his total dominion and control, both before and after the transfer of stock from father to son.

In conclusion, there is nothing wrong with George Wintz setting his son up in business. The problem in this case arises because he started too early, and, as of the date of the hearing, he still had not relinquished control to his son. The only way in which the Board can allow the transfer to take place is if it can be assured that George Wintz will not control DGT and its subsidiaries. One way to achieve such assurance is to impose a list of conditions, and a timetable for their completion. Otherwise, the Board must deny the transfer.

IV.

The LCC permit transfer is governed by a different statute than the IRCC permit transfer. The IRCC transfer statute requires notice of a stock transfer within 90 days thereafter. The LCC transfer statute requires notice within 30 days of the transfer. The notice given was, at best, given on

August 5 or 6, which is 48 or 49 days after June 19. The exact receipt date of Ex. 32 is unknown.

There is no penalty specified in the statute for failure to give timely notice, and no party to this proceeding has suggested that the failure to give timely notice deprived the Board of jurisdiction over the transfer. Under the circumstances, the delay is a harmless error.

A.W.K.